In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1046

AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This appeal challenges the validity of an Interstate Commerce Commission order authorizing operations by certain motor carriers that are wholly owned

subsidiaries of railroads. Appellant is an association of motor carrier associations which, together with two independent motor carriers, opposed the certification of these subsidiaries before the Commission. The two independent motor carriers subsequently withdrew their opposition (J.S. 3-4), and appellant alone now seeks to overturn the Commission's order.[1]

In 1961, Eastman Kodak Company began construction of a new plant at Oakbrook, Illinois. Oakbrook is located 2.5 miles outside the Chicago commercial zone,[2] but within the terminal area[3] of the New York

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[1] Appellant's standing—by itself—to attack the Commission's order is open to some question. Appellant is an association, not of motor carriers, but of motor carrier associations; and any injury to the associations from the order is, at most, highly speculative. Compare *Associated Industries* v. *Ickes*, 134 F. 2d 694, 699-703 (C.A. 2); *National Coal Assn.* v. *Federal Power Commission*, 191 F. 2d 462 (C.A. D.C.); *MacArthur Liquors, Inc.* v. *Palisades Citizen Assn.*, 265 F. 2d 372 (C.A. D.C.). And, unlike the rate bureau that was the appellant in *National Motor Freight Traffic Assn.* v. *United States*, 371 U.S. 223, on reconsideration, 372 U.S. 246, appellant here has no independent statutory function in the scheme of the Interstate Commerce Act. Finally, as noted in the text, no individual motor carriers have joined with appellant in this appeal. Compare *American Trucking Assns.* v. *United States*, 355 U.S. 141, 146-147; *American Trucking Assns.* v. *United States*, 364 U.S. 1, 5.

[2] The "commercial zone" is the area surrounding a city, within which motor transportation is so local as to be exempt from economic regulation by the Commission. 49 U.S.C. 303 (b)(8).

[3] A "terminal area" is that area surrounding an origin or destination point within which bona fide collection, delivery, or transfer services may be performed (J.S. 33, n. 3). Section 202(c) of the Act, 49 U.S.C. 302(c), provides that motor

Central Railroad at Chicago. Thirty motor common carriers, all of which had served Eastman at its old location, which was within the Chicago commercial zone, applied to the Commission for authority to serve the new plant. Eastman established its need for the continuation of this service (J.S. 38), and the Commission certificated each of the independent motor carriers to continue to perform it at the new location (J.S. 31-45).

Two additional motor carrier applicants for authority to serve the new plant were wholly owned railroad subsidies—Rock Island Motor Transit Company ("Transit"), a subsidiary of the Chicago and Rock Island Railroad, and New York Central Transport ("Transport"), a subsidiary of the New York Central Railroad. Transit had, pursuant to Commission authorization, served the old Eastman plant on outbound traffic to points in a number of States (see *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419), and the Commission found that Eastman needed Transit's service (J.S. 38), particularly its less-than-truckload "peddle service."[4]

As in previous cases involving applications for motor operating authority by a rail subsidiary, the Commis-

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transportation for a railroad within a railroad terminal area shall be regulated under the provisions—such as those involving reasonable rates and tariff requirements—that are applicable to railroads.

[4] "Peddle service" refers to "starting with a full load and delivering at various destination points, or the converse, picking up parts of a load at various points and delivering at a single destination." *American Trucking Assns.* v. *United States*, 355 U.S. 141, 148, n. 9.

sion required Transit to show "special circumstances" justifying railroad entry into the motor carrier field (J.S. 36). Transit established that: (1) no independent motor common carrier opposed Transit's application; (2) no evidence was introduced that competing motor carriers were able or willing to serve the points Transit was authorized to serve (J.S. 37-38); (3) no new service would be authorized; rather, the former service would be continued; and (4) the continued service would be but a slight extension of that service (J.S. 38). On the basis of this showing the Commission certificated Motor Transit to serve Oakbrook as an off-route point in connection with its existing authorized regular route operations (J.S. 41-42).

The other subsidiary, Transport, proposed to serve Eastman from the railhead at Chicago to the Oakbrook plant after a rail movement from Eastman's Rochester, New York plant (J.S. 33, 39). Oakbrook is described in a tariff of the New York Central Railroad as within that railroad's Chicago terminal area. Since the proposed operation was thus motor service within a terminal area incidental to rail transportation, which is regulated under Part I, and exempted from Part II, of the Interstate Commerce Act (49 U.S.C. 302(c)(2)), the Commission denied Transport's application for authority under Part II as unnecessary.

The district court sustained the Commission's order (J.S. 23-30), holding that "the Commission correctly concluded that special circumstances exist which amply justified the grant of Motor Transit's applica-

tion" (J.S. 29), and that "the Commission was correct in concluding that Transport did not need a certificate for its operations between Chicago and Oakbrook" (J.S. 30). The district court also indicated its view that appellant lacked standing (see p. 2, n. 1, *supra*), but did not rest decision on this point (J.S. 24, n. 2).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court.

1. Rock Island Motor Transit was properly granted a certificate on the same evidence of shipper need for service that supported grants of certificates to the independent motor carriers, coupled with the further showing of special circumstances. Section 5(2)(b) of the Interstate Commerce Act [5] confines acquisitions

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[5] Section 5(2)(b), 49 U.S.C. 5(2)(b), provides in pertinent part as follows:-

> * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to

of motor carriers by railroads to service that is auxiliary or supplemental to train service (*United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 434), and the Commission is guided by the policy underlying this restriction in considering applications by rail-affiliated motor carriers for certificates of public convenience and necessity (*American Trucking Assns.* v. *United States*, 355 U.S. 141, 149-150). However, the Commission may depart from the criteria of § 5(2)(b) in particular proceedings under Section 207 "where 'special circumstances' prevail, namely, where unrestricted operations by the rail-owned carrier are found on specific facts and circumstances to be in the public interest." *Ibid.* In determining whether such special circumstances exist, the Commission has a broad discretion (*American Trucking Assns.* v. *United States*, 364 U.S. 1, 16), which was not abused here.

(1) There was no suggestion in the proceedings that competition might be unduly restrained within the sense of § 5(2)(b) if the certificate were issued. Indeed, Transit's application was not opposed by the twenty-eight independent motor carriers serving the shipper.[6] Nor was there any indication that any of them were willing or able to take on the additional burden of replacing Transit's service.

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use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

[6] The two independent motor carriers who initially challenged its application subsequently withdrew their opposition.

(2) The shipper testified to its need and desire for the services of all of these carriers, including the less-than-truckload service provided by Transit. In fact, Eastman singled out its need for Transit's less-than-truckload service (Exh. 3, pp. 5, 6, 7, Appendix).

(3) Transit was not seeking authority to provide a new service to a shipper. It had provided identical service to Eastman at its Chicago plant until the facility was moved to Oakbrook and sought merely to continue this service. Thus, Transit's proposed service will not "inject a new quantum of competition" (J.S. 37). See, *e. g.*, *Pennsylvania Truck Lines, Inc. v. United States*, 219 F. Supp. 871 (W.D. Pa.).

(4) Since Eastman's plant has been moved only 2½ miles outside the Chicago commercial zone, in which Transit is presently authorized to conduct unrestricted operations, the extension authorized by the instant certificate is *de minimis*—constituting, as the Commission observed, "but a slight extension" of Transit's prior authority in the same geographical area (J.S. 38).

2. The Commission correctly found that Transport needs no authority under Part II to move motor trailers from Chicago to Oakbrook. Transport has expressly stipulated that it has no intention of handling "traffic which has not had a prior, or will not have a subsequent, rail movement" (J.S. 46), and its proposed operations are clearly within the New York Central's terminal area as defined in its tariffs. Under Section 202(c)(2) of the Act, 49 U.S.C. 302(c)(2), Transport's operation is therefore exempt from

Part II and subject to Part I, as service within a terminal area incidental to rail transportation.

Appellant presented no evidence to show that the New York Central Railroad has exceeded a reasonable terminal area around Chicago by including Oakbrook. But, at all events, appellant's contention in this regard is not foreclosed. It may, as the lower court suggested, file a complaint against the New York Central with the Commission (J.S. 29-30); or it may seek to initiate a rulemaking proceeding to define the terminal area (see J.S. 19; 49 C.F.R. § 1.44). And certainly the mere possibility of future abuse by this or other railroads (see J.S. 17-18) provides no basis for limiting the present terminal area. See *United States* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 294 U.S. 499, 507.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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